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No. 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, AND THE HONORABLE ANDREW D. CHRISTIE, SITTING AS A JUDGE OF THAT COURT, AND CITIES SERVICE GAS COMPANY, *Respondents*.

On Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR PETITIONER PAN AMERICAN PETROLEUM CORPORATION

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OPINIONS BELOW

The opinion of the Superior Court of the State of Delaware in and for New Castle County (R. 8-21) is reported at 155 A. 2d 879. The opinion of the Supreme Court of the State of Delaware (R. 33-46) is reported at 158 A. 2d 478.

JURISDICTION

The judgment of the Supreme Court of Delaware was made and entered on March 18, 1960 (R. 47-48). Petition for Writ of Certiorari was filed on May 6, 1960, and was granted on June 13, 1960 (R. 780). Jurisdiction of this Court rests upon 28 U.S.C. § 1257(3). The issue of Petitioner's rights and immunities under the Natural Gas Act was raised by its Answer (R. 620, 623-627, 634), by Motion for Summary Judgment (R. 656), and by Petition for Writ of Prohibition in the Supreme Court of Delaware (R. 1, 4-5, 6).

QUESTION PRESENTED

Where, after tender of a rate for filing under the Natural Gas Act, the Federal Power Commission formally accepts, files, and makes such rate effective, do the courts of the several states thereafter have jurisdiction

(a) to declare the Commission decision making such filed rate effective to be a nullity;

(b) to substitute a different price for the filed rate; and

(c) to enforce an alleged, unfiled agreement which changes, retroactively, the filed rate made effective by the Commission decision.

STATUTES INVOLVED

Pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*) are set forth in the Appendix, *infra*, pp. 59-65. Pertinent provisions of the Federal Power Commission Regulations Under the Natural Gas Act, having force and effect of statute, are also set forth in the Appendix, *infra*, pp. 66-71.

STATEMENT

Jurisdiction of the Federal Power Commission (Commission) over producers' rates for sales of natural gas in interstate commerce for resale was upheld on June 7, 1954. *Phillips Petroleum Co. v. State of Wisconsin, et al.*, 347 U.S. 672 (1954). The rate for such a sale is the subject of the present controversy.

1. *Federal Power Commission action.* Immediately after the *Phillips* decision, the Commission implemented the requirement of Section 4(c) of the Natural Gas Act (the Act) that every natural-gas company file and keep open for public inspection, schedules of rates and charges. To that end on July 16, 1954, the Commission amended its Regulations under the Act, and directed producers, including Petitioner, to file schedules of rates in effect on June 7, 1954, including statements showing actual billings, copies of contracts, supplements or agreements, and rules or regulations affecting rates or charges.[1] The Commission also prohibited change of any rate in effect on or after June 7, 1954, unless notice of such change is filed under Section 4(d) of the Act and the Regulations. (See 18 C.F.R. § 154.94).

To comply with these Regulations and Section 4(c) of the Act, on November 16, 1954, Petitioner tendered the rate of 11 cents per thousand cubic feet (Mcf), at 14.65 pounds per square inch absolute (p.s.i.a.), in effect on June 7, 1954, for Petitioner's sale to Cities Service Gas Company (Cities) from leases in the Hugoton Field,

[1] The amendments to the Regulations were set forth in Commission Order No. 174, subsequently modified by Order No. 174-A, and now appear at 18 C.F.R. § 154.91, *et seq.* Pertinent sections are set forth in the Appendix, *infra*, pp. 66-71.

Kansas (R. 591-599).[2] Petitioner transmitted to the Commission a copy of a contract between Petitioner and Cities dated June 23, 1950 (R. 285-308); copies of all agreed-upon amendments thereto (R. 309-484); a copy of an order of the State Corporation Commission of Kansas prescribing a minimum price of 11 cents per Mcf for sales from the Hugoton Field on and after January 1, 1954 (R. 485-491); and a sample billing statement showing the tendered rate of 11 cents per Mcf (R. 496-498).

On November 16, 1954, Petitioner also gave notice to Cities of the tender of the 11 cent rate to comply with the Regulations, forwarding to Cities a copy of Petitioner's Letter of Transmittal to the Commission which identified in detail all documents tendered by Petitioner (Affidavit, R. 758-759). As required by Section 4(c) of the Act, Petitioner also kept its tendered filing open for public inspection at its General Offices in Tulsa, Oklahoma.

No protest of the 11 cents rate was made under Section 154.27 of the Regulations, nor was objection made under any other provisions of the Commission's Rules.[3]

On January 26, 1955, the Commission duly convened and, among other matters, considered Petitioner's tendered rate (R. 635, 636). The minutes of this meeting of the Commission show that the Commission construed the tendered rate schedule as providing for a rate of 11 cents

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[2] Petitioner's corporate name then was Stanolind Oil and Gas Company. The name was changed to Pan American Petroleum Corporation on February 1, 1957 (R. 282-284). Petitioner is referred to by both names in the record.

[3] Section 154.27 of the Regulations provides that comments of any purchaser concerning any filing pursuant to Part 154 of the Regulations, of which the sections applicable to producers are a part, "should be submitted within 15 days after the date of filing." The section specifically does not "limit" any right to file other protests and complaints under the Rules.

per Mcf.[4] The minutes record that upon the basis of documents tendered and this construction thereof, the Commission entered under "Summary of Independent Producers Rate Filings—Rates in Effect on June 7, 1954" a rate of 11 cents per Mcf for the sale involved (R. 639). The minutes further record that the Commission voted to accept the tendered rate of 11 cents per Mcf for filing; the rate of 11 cents thus was made effective as the rate accepted by the Commission as the filed rate, and was thereupon entered in the Commission's public files and records as such (R. 636).

At the same time, the Commission ordered its Secretary to give notice of this action (R. 637). Notice was by letter order dated March 2, 1955 (R. 640).[5] After advising that the tendered filing had been "accepted for filing," the Commission gave notice that any change of the rate would constitute a change of rate within the meaning of Section 4(d) of the Act and Section 154.94 of the Regulations, requiring a new filing with the Commission; and that acceptance did not constitute "approval" of any rate or recognition of any contractual obligations, and was without prejudice to findings or orders by the Commission in any pending or future proceedings. Petitioner's filing was designated as Petitioner's FPC Gas Rate Schedule No. 84 and Supplement Nos. 1-77 thereto (R. 641-646).

No protest of this action was made, nor did Cities file an application for rehearing under Section 19(a) of the Act.

Cities paid Petitioner the 11 cents per Mcf filed rate for gas delivered up to July 1, 1957, when the rate was

[4] Minutes of such Commission acts are "public files and records of the Commission which are available for public reference . . . ." (See 18 C.F.R. § 1.36(c)(6)).

[5] Such letter orders are also public files and records of the Commission open to public inspection (See 18 C.F.R. § 1.36(c)(3) and (6)).

changed to 11.0715 cents per Mcf. This rate of 11.0715 cents per Mcf was tendered to the Commission by Petitioner as a change of the rate, as required by Section 4(d) of the Act, the Regulations, and the Commission's letter order of March 2, 1955. Increase of the then effective rate of 11 cents per Mcf was necessary to enable Petitioner to collect from Cities reimbursement due for 65% of payments by Petitioner of a Kansas gas severance tax of 1% (R. 647). Petitioner's notice of this change set forth the then effective rate of 11 cents upon which the 1% was to be calculated, and the resulting increased rate of 11.0715 cents per Mcf to be effective on and after July 1, 1957 (R. 648).

On June 28, 1957, immediately prior to tender of this rate to the Commission, Petitioner served a copy of its filing upon Cities (R. 648), but Cities made no protest of or objection to the tendered rate.

At its meeting of July 24, 1957, the Commission considered the tendered change of rate (R. 651). The minutes of that meeting show that the Commission construed the rate schedule and filings as providing for a rate of 11 cents per Mcf prior to change; for an increase of .0715 cents based upon the percentage of that effective 11 cents rate; and for a new rate of 11.0715 cents per Mcf after the change of rate (R. 653). The minutes show that upon such constructions the Commission entered under "Summary of Independent Producer Rate Filings—Changes in Rate Filings Previously Reported to the Commission," the then effective rate of 11 cents per Mcf; the increase of .0715 cents per Mcf; and as the rate effective after increase, the rate of 11.0715 cents per Mcf (R. 653). Upon consideration, the Commission voted to accept the increased rate for filing and at the same time voted to waive the thirty days' notice requirement and permit the increased rate of 11.0715 cents per Mcf to be effective as of July 1, 1957;

and the tendered change thus was entered in the public files and records of the Commission (R. 651).

As directed by the Commission, the Secretary, by letter order dated August 19, 1957, gave notice of acceptance of the 11.0715 cents rate for filing (R. 654). The same order designated the change of rate as Supplement No. 80 to Petitioner's Rate Schedule No. 84 (R. 655). Shortly thereafter, by letter dated August 29, 1957, Petitioner mailed to Cities a copy of the Commission's letter order (R. 763).[6]

Cities made no objection to the Commission's action, nor did it file an application for reconsideration under Section 19(a).

Cities paid this filed rate of 11.0715 cents per Mcf for gas delivered from July 1, 1957, through November 22, 1957.

2. *Cities' Attack Upon the Filed Rate.* On January 29, 1958, Cities made demand upon Petitioner for the difference between 11 cents per Mcf at 14.65 p.s.i.a. and 8.4 cents per Mcf at 16.4 p.s.i.a. for all gas delivered from January 1, 1954 to November 22, 1957 inclusive, with interest thereon at 6 per cent per annum from the dates of "over payments." Cities referred to the order of this Court on January 20, 1958, reversing a judgment of the Supreme Court of Kansas which had held that state's minimum price order valid. Cities asserted that invalidation of the state order entitled it to refunds on the ground of involuntary payment, but Petitioner refused this demand.

On June 25, 1958, Cities filed a complaint in the Superior Court of the State of Delaware in and for New Castle

[6] Although such orders are public documents open for public inspection under the Act and Commission's Rules, Cities on May 15, 1955, by form letter stated that under the Act and the Regulations, it could pay only the rate made effective by Commission action. Therefore, Cities had then requested Petitioner to furnish additional copies of such Commission orders and communications for Cities' convenience in maintaining its own private files (R. 760).

County, demanding judgment for refunds and alleging that it was entitled to recovery upon the basis of an alleged "refund contract" and theories of restitution and unjust enrichment (R. 232-237). This "refund contract" was alleged to have been created by (1) a letter Cities had sent to Petitioner on January 21, 1954, stating that Cities had then decided to pay the state minimum price, that such payments were involuntary, and that Cities expected to recover on that ground any payments occasioned by the state order in the event of its invalidity (R. 609-610); (2) a letter Petitioner had addressed to Cities on January 27, 1954, offering to agree to refund without interest any overpayments occasioned by the state minimum price order should that order be declared invalid in an adjudication binding and controlling on Petitioner (R. 611); and (3) notations on vouchers attached to checks issued by Cities, which referred to Cities' own letter of January 21, 1954 (R. 234-235). The complaint as initially drawn made no reference to exercise of jurisdiction over the rates by the Commission, nor to Commission action making Petitioner's tendered rates effective under the Act.

Cities next moved for a summary judgment, basing its motion not only upon its earlier pleading but also upon exhibits attached to its motion (R. 278-281). Included in these exhibits were a copy of Petitioner's FPC Gas Rate Schedule No. 84, certified by the Records Officer of the Commission (R. 281, 282-554), and similarly certified copies of other documents (R. 589-607).

Next, on May 12, 1959, Cities amended its complaint to show, *inter alia*, that it operates an interstate gas pipeline system and is engaged generally in purchasing gas for transportation and sale in interstate commerce for resale, "in furtherance whereof" it entered into a sales contract with Petitioner (R. 619-620).

3. *Petitioner's Motion for Summary Judgment.* On May 26, 1959, Petitioner answered in the light of this

amended complaint and Cities' Motion for Summary Judgment (R. 620-635). Petitioner denied the existence of any "refund contract" and that any payments of the filed rate constituted "overpayments" (R. 620, 622-623),[7] and also set forth the facts of tender of the rates of 11 cents and 11.0715 cents per Mcf to the Commission (R. 620, 623, 625); Commission action making those rates effective under the Act (R. 620, 624, 625); and the absence of protest of, objection to, or petition for judicial review of Commission actions (R. 620, 626). Petitioner then challenged the state court's jurisdiction on the grounds that Cities sought to annul and set aside Commission action by unlawful collateral attack, based upon an alleged "refund contract" not on file with the Commission, and actually sought enforcement of claimed rights under a rate for a regulated sale (R. 620, 626-627, 634).

[7] For its Answer, and assuming it could now be lawful for a state court to go behind Commission actions to re-examine a "foundation" of a filed rate, Petitioner, thus, was and is, prepared to show that Cities still would not be entitled to recovery because the unfiled letter and notations alleged to be a "refund contract" do not constitute such an agreement, in fact or in law; that if contract law *is* applied, the relationship has been modified by acquiescence and estoppel; and all payments, as a matter of law, are deemed to be voluntary and hence those made for gas delivered prior to June 7, 1954 are unrecoverable (R. 620, 627-634). Subsequent to this Answer, a certificate covering the sale, under Section 7 of the Act, was issued by the Commission on December 2, 1960, with a proviso that "issuance of this certificate does not constitute a determination of what was or is the price for the sale by Pan American to Cities Service, and is without prejudice to whatever determinations may be reached on the dispute between Pan American and Cities Service concerning this matter, or the rights of the parties in regard to this matter." This correctly leaves unchanged the earlier Commission actions under the filing procedures of Section 4 in 1954, 1955, and 1957, accepting, filing, and making effective Petitioner's tenders, which are the statutory procedures for and duties of the Commission for establishing filed rates under the Act, as were detailed in the Answer (R. 620, 624, 626).

On June 8, 1959, Petitioner also moved for summary judgment (R. 650-657), and submitted affidavits and exhibits supporting its allegations as to Commission action and absence of jurisdiction in a state court because federal regulation barred a coercive common law action upon which Cities was relying (R. 656). In opposing this motion, Cities asserted that even if its original complaint was defective in not reciting with specificity the facts as to the filed rate "such defects have been cured and supplied by defendants' own allegations" (Brief, R. 771, 777-778). After discussion of its "refund contract" theories, Cities ultimately took the position that "[t]he only lawful rate is the filed rate with the Federal Power Commission . . ." (Brief, R. 771, 775), and agreed that no rate may be claimed by a purchaser "as a legal right" that is "other than the filed rate, whether fixed or accepted by the Commission, and not even a court can authorize commerce in a commodity on other terms," but argued that the "filed" rate was the price of 8.4 cents at 16.4 p.s.i.a. (R. 775).

Simultaneously, in support of its own Motion for Summary Judgment, Cities told the court that it sought "merely to enforce its right to a refund of the payments made in excess of the contract rate which is necessarily the same rate as is fixed in [Petitioner's] rate schedule" (Brief, R. 764, 766); that the "filed rate" is 8.4 cents per Mcf at 16.4 p.s.i.a. (Brief, R. 764, 767); that the "rate fixed by defendant's rate schedule is binding upon plaintiff and defendant and upon this Court, with the force and effect of federal statute" (Brief, R. 764, 767); that there may be no sale of natural gas at any rate other than the filed rate (Brief, R. 764, 768); and that once the state court had determined the filed rate, that state court "is bound, as a matter of law, to enforce that rate" (Brief, R. 764, 770).

At this juncture, the trial court denied defendants' motions identical to Petitioner's, which were then pending in companion cases to which the schedule of procedure in

the action against Petitioner had been bound by stipulation (See R. 617-619).[8]

4. *The Superior Court's Decision.* The trial court first found that "both parties agreed that as to the period after July 16, 1954, at least no rate may be asserted as a legal right that is other than the filed rate." The court then considered the question of whether it was without jurisdiction in the light of Section 22 of the Natural Gas Act, vesting "exclusive jurisdiction" in the United States District Courts of "all suits in equity or actions at law, brought to enforce any liability or duty, created by" the Act "or any rule, regulation, or order thereunder" (R. 8, 12-13).

The court concluded that the actions were based "on contracts and/or restitution," but went on to say that the plaintiff could not recover if its claimed right was contrary to the Act or orders thereunder (R. 13). The court held that if what it conceived to be the filed rate and a contract price were different in amount, it had no jurisdiction because in that event Cities' common law actions would be inconsistent with the Act; but that if the two were the same in amount, the court had jurisdiction to entertain the common law counts and to render judgment on *them*. To the court, this conclusion meant that it would be necessary to interpret "federal law and regulation" and "the filings," but that a decision upon the merits would not involve a decision in an action brought to enforce a liability or duty created by the Act, or Commission actions thereunder, because it would be based on common law counts (R. 14). The court then concluded that it had jurisdiction to pass upon defendants' motions, and that decision upon the merits necessitated deciding the status of the

[8] The companion cases are actions by Cities against Texaco, Inc., and Columbian Fuel Corporation, Petitioners in Nos. 81 and 82, respectively, in this Court.

Kansas order prior to July 16, 1954,[9] and "a determination of the rate filed with the FPC after that date" (R. 14).

On the latter question, the court again noted that "[b]oth parties agree that as to the period after July 16, 1954, the only legal rate is the filed rate 'and not even a court can authorize commerce in a commodity on other terms . . .'" (R. 18). The court then stated the ultimate question to be ". . . what rate was legally filed?" (R. 18). The court then proceeded to hold that actions of the Commission could not change an "original contract rate," and, since the Kansas order subsequently was held void, "the only lawful filed rate is the contract rate" (R. 21). Thereupon, the defendants' motions were denied.

5. *The Supreme Court Decision.* Petitioner, with the defendants in the consolidated companion cases, then filed a joint petition for writ of prohibition in the Supreme Court of Delaware, challenging jurisdiction of the state court over the subject matter of the pending actions (R. 1-7), and averring "that jurisdiction of claims concerning rates under the Natural Gas Act is exclusively invested in the federal courts, or in the Federal Power Commission, and that the courts of this state have no jurisdiction thereof" (R. 6). Cities, intervening, filed an answer to the Supreme Court's rule to show cause (R. 24-29).

The Supreme Court of Delaware correctly concluded that the Act requires the filing of both rate schedules and rates under regulations prescribed by the Commission (R. 33, 35); found that Petitioner had submitted such a schedule,

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[9] The trial court ruled that the Kansas order was *void ab initio*, rejecting contentions of defendants that it remained valid until the Federal Power Commission actually pre-empted the field to exercise jurisdiction on July 16, 1954, by issuing Order No. 174 (R. 14-18). *Cf. Buck* v. *People of State of California*, 343 U.S. 99 (1952); *Missouri Pacific Railway Company* v. *Larabee Flour Mills Co.*, 211 U.S. 612, 623 (1909).

and in connection therewith, tendered 11 cents per Mcf as its June 7, 1954 filed rate; recognized that, by vote at a meeting duly convened, the Commission had so construed that rate schedule as providing for a June 7, 1954 price of 11 cents per Mcf; recognized that thereupon the Commission accepted and filed 11 cents per Mcf as Petitioner's June 7, 1954 filed rate; and recognized that the Commission had given notice of these actions (R. 33, 35-37). However, the court then held that because of invalidity of the state order, the rate schedule "provided for" an 8.4 cents price instead of the 11 cents rate, and in effect, and for that reason, the Commission's acceptance of the 11 cents rate for filing was a "nullity" (R. 45).

The court thus rested its ultimate conclusion upon determinations that the Commission's acts no longer had binding legal effect; that the voiding by the court of the Commission's acts resulted in a "filed" rate which was the same in amount as the alleged contract price; that the rate and contract price thus were not inconsistent; and that actions to enforce that rate, therefore, were maintainable in a state court (R. 38-40). The court concluded that since the Act does not abrogate private contracts as such, "a gas producer and distributor" remain free to agree to change their rates, absent a proceeding before the Commission to regulate the rate, and may agree to refunds in private unfiled contracts deriving force from state law (R. 41). Looking only at the complaints, the court then said that there was no "attempt to 'adjudicate' a proper rate," and that there was no collateral attack upon a filed rate because "reasonableness" was not in issue (R. 41, 44). Apparently concluding that rights and liabilities thus were controlled by "common law obligations," the court concluded that jurisdiction over the rates remained in the state courts (R. 46).

Final judgment was entered on March 18, 1960 (R. 47), and on the same date stay of judgment pending final order

of this Court "in any certiorari proceedings" was entered (R.-48).

SUMMARY OF ARGUMENT

Petitioner's rates of 11 cents and 11.0715 cents per Mcf (at 14.65 p.s.i.a.) were accepted, filed, and made effective as filed rates under the Natural Gas Act. Alleging that the rate should have been 8.4 cents per Mcf at 16.4 p.s.i.a., Cities has belatedly brought suit in the Delaware state court.

Cities' action must fall into but one of three categories, none of which may be maintained in a state court:

(1) As a common law action to enforce an alleged unfiled contract for a rate not on file with the Commission, the jurisdiction of the state court is defeated by the fact that the Commission by virtue of Section 4 of the Act has exclusive, primary jurisdiction over the rate to be charged by Petitioner and over all changes of that rate. No unfiled agreements, or even state commission orders, can infringe upon this exclusive jurisdiction of the Commission or change a filed rate.

(2) As an action to review and set aside orders of the Commission accepting and filing Petitioner's tendered 11 cent and 11.0715 cent rates, the action would come directly within the purview of Section 19 of the Act, which provides a complete and exclusive procedure for timely statutory review by the United States Courts of Appeals. This provision precludes state court jurisdiction in a collateral action to set aside, on any ground whatsoever, acts of the Commission accepting and filing a tendered rate.

(3) As an action to enforce a rate on file with the Commission, the action would come directly within the purview of Section 22 of the Act which provides, *inter alia*, that the District Courts of the United States shall have "exclusive jurisdiction . . . of all suits in equity and actions at law

brought to enforce any liability or duty created by . . . this chapter or any rule, regulation, or order thereunder." This provision of the Act precludes the possibility of state court jurisdiction of an action to enforce any rate on file with the Commission.

I. A filed rate can be changed only through the procedures of Sections 4 and 5 of the Act and cannot be changed retroactively in a collateral proceeding:

A. Section 4 requires tender of a rate and Commission action accepting and filing *that* rate before it may be legally charged for a regulated sale. Under comparable provisions of the Federal Power Act, this Court has held that no rate may be claimed as a legal right that is other than the filed rate, "whether fixed or merely accepted by the Commission," and a court cannot "authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Federal regulation thus cannot be supplanted by state court efforts to effect a change of a filed rate by means of "judgment" upon claimed rights under either state or federal law: (*Cf. Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)). The force and binding effect of Petitioner's filed rates thus derive from the Act and Commission action, and may not be changed by state court interpretation of a pre-existent state order or alleged contract.

B. The state courts erred in interpreting *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), to mean that state courts retain some jurisdiction to determine a "proper" rate for a regulated sale and to enforce such rate as though it were a "filed" rate. By so doing, a state court would unlawfully change a filed rate retroactively as well as prospectively. Under the Act, there is always but *one* rate currently effective—specific and definite in cents per Mcf as determined by

the Commission at the time of acceptance and filing. The Act and Regulations prohibit *any* change of that effective rate, even where a different price in cents per Mcf otherwise might be charged under terms of a contract, unless and until the change of rate—equally specific and definite in cents per Mcf—has been made effective by Commission action after tender under Section 4(d). As the court below found with respect to Petitioner's tender (R. 36), the Commission formally passes upon the specific tendered rate in cents per Mcf (R. 639), votes upon rejection or acceptance (R. 636), and issues notice of its action (R. 640). In addition, the Commission has provided administrative procedures for protest of a tendered rate, and upon challenge, defers acceptance or passes upon objections, including claims that a tendered rate is not in accord with some pre-existing contract price (*Cf.* R. 222, 224). The specific rate so accepted is the only legal, binding rate, fixing rights of both buyer and seller, and then may not be changed retroactively, but only prospectively under Section 4 or Section 5. (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944)).

C. Commission actions accepting and making effective filed rates were subject to review only in the United States Courts of Appeals, which under Section 19 of the Act have exclusive jurisdiction, subject to review by this Court, to set aside or modify Commission actions. If there is no timely protest and application for reconsideration under Section 19(a), and no timely petition for review under Section 19(b), Commission action accepting and making a tendered rate effective becomes, as here, final and unassailable collaterally. This has been the construction of the Act and Commission actions both before and after the *Mobile* decision, and clearly means that a state court cannot assume in a collateral proceeding years later, that Commission action, now final under the Act, is "null." Section 19(b) provides the exclusive procedure for such attack upon and modification of Commission action.

II. No matter what interpretation is placed upon its action or what theory is claimed in justification, the state court is without jurisdiction:

A. The courts below have recognized that the filed rate can be the only legal rate, binding both upon the parties and a court (R. 18, 41). Necessarily then, all rights, liabilities, or duties of buyer and seller always flow from orders under the Act *after* a filed rate is effective by Commission action. Enforcement of claimed rights, either "at law" or "in equity," with respect to the regulated rate, then is exclusively within the federal District Courts' jurisdiction under Section 22. The state courts seem to have sought to avoid this bar by determinations that Commission actions are "nullities"; that the "filed" rate, therefore, is equal to a "contract rate" asserted by Cities; and that enforcement by the state court of Cities' claimed rights to the latter "rate" thus would be permissible application of state law, and not inconsistent with overriding federal law or outstanding agency action. By amendment of its complaint, the plaintiff below had shown the status of the parties and of Petitioner's sale as subject to regulation under the Act (R. 619); next relied upon portions of the filed rate schedule and excluded other portions in seeking summary judgment (R. 278, 281); and then called upon the state court to enforce its claims under an alleged "filed" rate of 8.4 cents at 16.4 p.s.i.a. (R. 766, 770). Where the state court then must conclude, as was found necessary below (R. 14, 19, 20), that its jurisdiction to "enforce" a rate is dependent upon a declaration by it that some specific Commission action upon the rate—action by the agency in the exercise of its regulatory jurisdiction—is "null," then it is obvious that the federal scheme of regulation is paramount over the entire subject matter of rates. Jurisdiction lies only where it has been specifically vested by the federal statute prescribing a system of regulation of such subject matter—judicial

enforcement of claimed rights under a rate for the regulated sale could only be in a federal court under Section 22.

B. The process whereby the state courts seek to avoid the ban of Section 22 thus is but a dismantling of the federal regulatory scheme. If a state court purports to declare the 11 cents and 11.0715 cents filed rates to be "nullities," it is entertaining a collateral attack and usurping jurisdiction of the federal Courts of Appeals under Section 19; if it purports to enforce an alleged 8.4 cents as the "filed rate," it is usurping the jurisdiction of the federal District Courts under Section 22; and if it purports to enter judgment for "restitution" of payments at the filed rates, it is not only violating the ban on retroactive change, but also usurping the Commission's jurisdiction under Sections 4 and 5 over prospective changes of the filed rate. In the circumstances, the plaintiff below was fully aware of its remedies to protest a tendered 11 cents rate and to challenge Commission acceptance through the Commission's Rules and Regulations and Sections 19(a) and 19(b),[10] but now it mounts belated, collateral attacks in a state court. Enforcement of such claims by a state court would destroy all certainty and finality heretofore accorded to and derived from rates effective by Commission action. The state court, not the Commission, would become the paramount forum of regulation, changing filed rates by its "judgment." State commissions cannot so regulate these rates,[11] and state courts, likewise, must be excluded by federal pre-emption.

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[10] See *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. den. sub. nom.*, *Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958), and R. 658-667, 670-677, 682-683, 697-698.

[11] *Natural Gas Pipe Line Co. of America* v. *Panoma Corp., et al.*, 349 U.S. 44 (1955); *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958).

ARGUMENT

I. UNDER THE NATURAL GAS ACT, THE RATE ACCEPTED AND FILED BY COMMISSION ACTION MAY NOT BE CHANGED RETROACTIVELY OR PROSPECTIVELY IN A COLLATERAL PROCEEDING.

Throughout the opinions below run two obvious but basic misconceptions. The first is as to the finality accorded Commission action filing a rate, in any subsequent, collateral proceedings; and the second is as to the pervasive paramountcy of federal rate regulation to the complete exclusion of state jurisdiction.

A. Filed rates fix rights and liabilities which may not be collaterally modified by alleged contract claims

This Court has not had occasion to consider the question of collateral attack upon a rate filed under the Natural Gas Act, but similar questions have arisen under other statutes.[12] The fundamental principle then has often been stated: a rate filed with and effective by action of a regulatory commission may not be modified collaterally by a court. A basic reason for the principle has been recognized as often: exercise of such jurisdiction by a court would destroy comprehensive, continuing commission regulation of the rate under the uniform procedure prescribed by statute.

The same principle applies to rates filed under the Natural Gas Act. Powers of natural-gas companies to agree upon prices *prior* to filing do *not* empower a state

[12] As noted in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 616 (1944), detailed procedures of Sections 4 and 5 are a "conventional form" of rate regulation. This form is based upon the earlier experience in federal regulation of rates, primarily under the Interstate Commerce Act. See *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (4th Cir. 1952); *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287 (4th Cir. 1943), rev'd other grounds, 320 U.S. 591 (1944).

court thereafter to change filed rates, such as Petitioner's, by reference to state law. The Delaware courts, while correctly concluding that the filed rate *is* the *only* rate binding upon the parties, erred at the outset by not recognizing that *any* change of the rate accepted and filed by the Commission, retroactively or prospectively, by enforcement of the court's conclusions under either state or federal law would be unlawful collateral modification.

1. Immunity of a filed rate from such collateral revision is exemplified by *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), involving construction of the Federal Power Act, which, like the Natural Gas Act, did *not* abrogate private contracts as such. (See *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956)).

Background of the case is pertinent. A purchaser had brought an action in a federal District Court, seeking to set aside filed rates and to recover damages. The rates in question initially had been agreed-upon by the plaintiff's predecessor and the defendant, and thereafter contracts "were filed with and accepted by the Federal Power Commission." 341 U.S. at 248. The plaintiff alleged that rates made effective not only were "unreasonably high" but also were void because put into effect by fraudulent conduct. Upon both grounds, a claim was asserted under the Federal Power Act. The District Court found the contracts void and the rates unreasonable, and gave judgment to the plaintiff. The Court of Appeals reversed, holding the District Court was without jurisdiction.

This Court, thereafter, held that since claims of rights under the Federal Power Act were alleged, the District Court had power to decide whether the claims constituted a cause of action maintainable in a federal court, but *also* held that a purchaser

". . . can claim no rate as a legal right that is other

> than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." (341 U.S. at 251).

To an argument that an exception to the filed rate principle should be made because of allegations that "fraud" and "deceit" underlay a rate, the Court replied that even though an action on such grounds might have been maintainable under state law *prior* to enactment of the Federal Power Act, the federal statute could not be the basis of such action. A relationship existing with sanction of the Commission, in the exercise of its jurisdiction under the federal statute, was held to override such presumptions of "fraud" which might have been drawn under state law. Concluding that the District Court could not "adjudicate" the issues tendered to it, this Court affirmed the Court of Appeals on these grounds.

Mr. Justice Frankfurter, joined by Mr. Justices Black, Reed, and Douglas, apparently disagreed only upon dismissing the complaint, stating that under the circumstances, the Federal Power Act might provide a basis for civil recovery after reference of specific issues to the Commission, "the body primarily charged with administration of the Act." 341 U.S. at 265. Even then, however, relief would not be under "the diverse and conflicting State law," and the Act and Commission powers would remain paramount. The agency's outstanding orders could not be ignored in such a collateral action because

> ". . . the legality of rates so filed is not conditioned upon the Commission's approval. Unless they are challenged, either by an interested party or on the Commission's initiative, the filed rates become the legal rates." (341 U.S. at 255-256)

As *Montana-Dakota* illustrates, bar to collateral change of a filed rate is not limited to precluding a court from entertaining an attack upon "reasonableness," as assumed

below (R. 33, 44). It *also* precludes collateral attack based upon alleged illegality under state law of contracts or fraud, of a rate filed by the Commission under a statute that does not abrogate private contracts, as such. Neither legal nor equitable claims thereafter can have foundation in conventional theories of invalidity of commercial transactions under state law, but can flow only from the filed rates under the federal statute. Even if a claim could be asserted with respect to a filed rate, action could be brought only in the federal court having jurisdiction under the federal statute, and even that court could *not* adjudicate a claim requiring it to set aside a filed rate collaterally.

2. This Court there applied the principle often upheld in earlier attempts to revise federal filed rates by collateral actions. From such actions has come the doctrine that a filed rate fixes rights exclusively, regardless of what (1) may have been the relationship of the parties *prior* to filing of that rate, and (2) concepts of "conventional" law that might have governed rights and liabilities in the absence of a federal regulatory statute and of the filed rate.

Brief reference to such cases highlights this paramount nature of the filed rate, brushed aside as irrelevant below. In the past, the device of seeking enforcement of alleged but unfiled agreements to avoid a filed rate thus was long ago condemned, on the grounds that a rate for a regulated transaction becomes legally operative only through compliance with statutory procedures, and that where an effective schedule is on file, the effective rate therein is exclusive. (See *Kansas City Southern Railway Co.* v. *C. H. Albers Commission Co.*, 223 U.S. 573 (1912)). Similarly, it was recognized that a filing procedure exists so that documents accepted and filed by the regulatory commission without objection may always provide notice of the effective tariff or rate; that the filing company, users of

a service, and the public all are "charged with notice" of that effective rate; and that the duty of the user of a service to pay, and the right and obligation of the regulated company to collect, flow from that effective rate. (See *Berwind-White Coal Mining Co.* v. *Chicago & Erie Railroad Co.*, 235 U.S. 371 (1914); *Louisville & Nashville Railroad Company* v. *G. A. Maxwell*, 237 U.S. 94 (1915)).[13] The cases decided during the period of attack upon paramount regulation under the Interstate Commerce Act, thus provide an extensive index to diverse theories evolved to modify filed rates collaterally, the theories apparently being equalled only by decisions preserving regulation under the statute.[14]

3. The state courts below, therefore, were not faced with an entirely novel attack having no historical parallel,

[13] See also 3 Merrill on Notice § 1118, pp. 23-24 (1952 ed.).

[14] Thus, filed rates supersede liabilities allegedly growing out of state statutes, and are not to be abrogated by exacting penalties for violations of such statutes, *The Gulf, Colorado & Santa Fe Railway Co.* v. *Hefley & Lewis*, 158 U.S. 98, 102 (1895). The rates filed under the federal statute, likewise, override alleged, but inconsistent contracts, *Texas & Pacific Railway Company* v. *Mugg & Dryden*, 202 U.S. 242 (1906); *James C. Davis* v. *R. L. Cornwall*, 264 U.S. 560 (1924); mistake or accident in quotation of a filed rate, *Kansas City Southern Railway Co.* v. *J. M. Carl*, 227 U.S. 639 (1913); and obligations or rights allegedly growing out of torts, *John W. Keogh* v. *Chicago Northwestern Railway Co.*, 260 U.S. 156 (1922); and form the basis for any cause of action where there is a dispute over compensation for a service for which a rate is on file. See *Crancer* v. *Lowden*, 315 U.S. 631, 635-636 (1942); *Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939); *Bernstein Bros. Pipe & Machinery Co.* v. *Denver R. G. W. R. Co.*, 193 F. 2d 444 (10th Cir. 1951); *Armour & Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 254 F. 2d 719 (7th Cir. 1958); *Thompson* v. *St. L.-S. F. Ry. Co.*, 318 F. 2d 166 (8th Cir. 1954). For similar application of the bar to collateral attack upon a rate filed with a state commission, where action was brought to enforce a private, unfiled agreement, see *Steele* v. *General Mills*, 329 U.S. 433 (1947).

regardless of ingenuity with which the attack may have been mounted initially. In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the question of jurisdiction of a state court to entertain and decide a cause of action attacking a rate on file under the Interstate Commerce Act was reviewed. After consideration of the plenary power of the federal agency, this Court held that the statute prohibited exercise of jurisdiction by a state court to "effect a change of a filed rate" by means of "judgment" in a collateral proceeding. (204 U.S. at 440). In detail and without limitation to the issue of "reasonableness," the necessities for denying such state court jurisdiction to preserve the federal scheme of regulation were reviewed. This Court there gave the still pertinent admonition that even an express statutory preservation of common law rights, where *consistent* with agency action, could not be construed as foundation for such state jurisdiction, because the Act could not be thus held "to destroy itself" by permitting collateral revision of agency action by a state court. (204 U.S. at 446-447).

With reference to that case, this Court also recently held that because of the filed rate principle, rates filed under the Motor Carrier Act may not be overturned by enforcement of an alleged common law right to "reasonable" *past* rates. *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). The majority of this Court concluded that failure of Congress to delegate reparation powers to the Interstate Commerce Commission showed intent to insure motor carriers in their rights to filed rates. Absence of that power in the commission's jurisdiction over motor carriers, does not mean that the same filed rates may otherwise be modified retroactively in the courts by enforcement of a claim resting on common law theory.

4. The Delaware courts thus have failed to recognize that a filed rate fixes *continuing* rights and liabilities in a regulated transaction, and similarly erred in concluding

that *after* Commission action, common law claims may collaterally change the charge legally enforceable in the regulated transaction. The filed rate has been so held to be paramount under comparable provisions of the Federal Power Act as to rates "merely accepted" for filing and where a common law relationship preceded effectiveness of the filed rate, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); and the same doctrine has been held by the lower federal courts to be equally applicable to rates filed under the Natural Gas Act itself. See *McClellan* v. *Montana-Dakota Utilities Co.*, 104 F. Supp. 46 (D.C. Minn. 1952), aff'd, 204 F. 2d 166 (8th Cir. 1953); *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 103 F. Supp. 666 (Mont. 1951).

Against this background—in which the conclusion has been stated many times that unless the filed rate is so preserved, a comprehensive regulatory structure could dissolve into diversities of collateral, state enforcement of alleged contract, tort, fraud, or other liabilities—the state courts erroneously concluded that the Natural Gas Act accords a filed rate no such immunity.

B. Section 4 vests in the Commission jurisdiction and duties of determining whether to reject, or accept and make effective, a rate at the time of tender, and prohibits change of the rate so filed except through compliance with the Act

The state courts have assumed that because the Act permits private agreements, an alleged contract price may be collaterally enforced to change the specific rate filed and made effective by Commission action under Section 4. This is incompatible with the statute, and is based upon misconceptions of statutory and administrative procedures.

1. Under Section 4, the Commission has the jurisdiction and duty of determining at the time any rate is tendered, whether to accept and make that specific rate effective under Section 4, or whether to reject that rate as being

unsatisfactory or improper under its regulations and the statute. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *Warren Petroleum Corp.* v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960). A company and its purchasers can do business only upon the basis of what the Commission decides in so passing upon the tendered rate. When the Commission acts; accepts and makes effective that tendered rate, it is never assumed to have been "derelict in its duties," but as is the case with any administrative body, the presumption always is that the Commission performs the functions necessarily required for the exercise of this statutory duty. See *Federal Power Commission v. Union Producing Co.*, 230 F. 2d 36, 40 (D.C. Cir. 1956); *United States* v. *Rock Royal Co-op. Inc.*, 307 U.S. 533, 567-568, fn. 35 (1939); *Adams* v. *Nagle*, 303 U.S. 532, 540-544 (1938); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *Ross* v. *Stewart*, 227 U.S. 530, 535 (1913); *Lumberman's Mutual Casualty Co.* v. *Industrial Acc. Comm.*, 29 Cal. 2d 492, 501, 175 P. 2d 823, 829 (1946); *Valier Coal Co.* v. *Department of Revenue*, 11 Ill. 2d 402, 143 N.E. 2d 35 (1957).

Charge of the specific rate tendered always awaits the specific action taken by the Commission at the time it passes upon the tendered rate under Section 4, and that action and nothing else, thereafter controls the legal relationship of buyer and seller until there is a change of rate under Sections 4 or 5. As fully illustrated by certified minutes and documents, the Commission formally performs this duty under Section 4 (R. 635-639). Whether contracts are involved or not, it considers the tendered rate in formal session; by its construction of documents tendered, makes its determination of the then applicable rate in exact cents per Mcf to be chargeable under Section 4; and then decides either to reject the tender, to accept it for filing making the tendered rate effective as the filed rate, or, in the case of a change of rate, to suspend it.

Rejections are frequent and arise from this construction of the tendered documents at the time of tender, on the Commission's own initiative or after protest lodged by a purchaser. Acceptances likewise result from the Commission's construction, and such Commission action obviously could result from what may be an erroneous conclusion in the view of one person or another. But, unless the Commission's action under Section 4 is set aside on timely review, it is binding upon buyer, seller, the Commission, or a court in all collateral proceedings thereafter, and the rate so filed may be changed only prospectively under Sections 4 or 5 of the Act.

Reference to these details of the statutory procedures demonstrates the basic errors of the state courts.

2. Filing procedures were reviewed in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), both cases reaching the courts through Section 19(a) and 19(b) of the Act. Neither case involved collateral modification, but both emphasize that it is the rate made effective by Commission action under Section 4 which is binding and unless actually set aside on timely review, supersedes any antecedent contract claim to some other rate. In *Mobile*, while recognizing that the Act permits "the relations between the parties to be established initially by contract," this Court noted that the Act requires Commission supervision of all such contracts, which "to that end must be filed with the Commission and made public . . ." Section 4(d) of the Act, therefore, provides that no change of a rate, whether *ex parte* or by contract, can become an effective rate unless and until there is compliance with filing requirements (350 U.S. at 339).

As the courts below found (*e.g.*, R. 10-11, 36), the Commission has never been merely a federal depository for contracts deriving force from state law. To the end that

all persons are on notice that the specific, tendered rate is reviewed, the Commission has called attention in Section 154.100 of its Regulations to "the right to reject any rate schedule or material submitted for filing." (18 C.F.R. § 154.100).[15] To the end that any interested person may be heard on objection to the tendered rate, the Commission has also provided in Section 154.27 that comments of any purchaser upon any filing under Part 154 of the Regulations should be submitted within 15 days after the filing; and the Commission's Rules further make ample provision for filing of both informal and formal complaints (18 C.F.R. § 1.6); petitions, including petitions for declaratory orders (18 C.F.R. § 1.7); petitions for intervention (18 C.F.R. § 1.8); and both informal and formal protests (18 C.F.R. § 1.10) (all of which were procedures available to Cities in 1954, 1955 and 1957).

Whether such protests or complaints are lodged or not, the Commission reviews submitted material, and in formal session passes upon the tendered rate, and by formal vote either rejects the rate or accepts the tender and thereby permits that rate to become the effective rate under the Act. Thereupon, the rate so accepted and filed cannot be changed retroactively under any section of the statute. (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944)). Change can be prospective only by (1) tender of a change of rate under Section 4 that is duly accepted and filed, or by (2) subsequent change by Commission order under Section 5.

3. This elaborate statutory and administrative procedure under Section 4 cannot be supplanted by the state court. If the Delaware courts were correct, the federal

[15] See also *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission*, 203 F. 2d 494 (3rd Cir. 1953); *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (4th Cir. 1953); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (3rd Cir. 1953).

Commission's actions under Section 4 would be but useless acts, and constructions of the Act and Commission orders by the federal Courts of Appeals for more than twenty years have been totally wrong.

The Commission's jurisdiction to decide myriad questions at the time of its review of a tendered rate has often been upheld. Because its action upon the tender under Section 4 is binding in establishing the specific, effective rate subject to judicial review but not to retroactive change, it must so pass upon the rate when tendered, and is empowered to determine questions pertinent to acceptance or rejection. Accordingly, the Commission decides whether the tendered rate complies with its own regulations (see *e.g., Mississippi River Fuel Corp.* v. *Federal Power Commission*, 121 F. 2d 159 (8th Cir. 1941); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899 (3rd Cir. 1953)); whether to defer decision upon its formal acceptance or rejection after protest until after further review of conflicting contentions of buyer and seller (see *e.g., Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960)); whether to impose a "condition" upon acceptance, which may be done *if* the company is clearly and specifically apprised of the exact, specific rate in the condition (see *e.g., Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404 (10th Cir. 1959)); and whether it would be error to accept and file the tendered rate (see *e.g., United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956)).

In *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F. 2d 906 (10th Cir. 1958), the scope of this primary jurisdiction under Section 4 was held to include jurisdiction to determine just what rate in cents per Mcf the Commission is accepting for filing under Section 4 (*e.g.*, R. 639). That jurisdiction includes the making of any preliminary determinations—*e.g.*, exactly what is to be the effective rate, or whether the then effective rate can be modified by

filing a change of the rate under Section 4(d). Determinations of this character are an inherent "incident" of the Commission's primary jurisdiction over the rate under Section 4 (258 F. 2d at 907).

The Commission's action under Section 4, solemnized as it is by formal minutes and letter orders, stands as final and controlling. Whether after so considering the tender in its session, the Commission has decided to accept or reject the specific rate tendered, and whether that action under Section 4 then is subject to timely reversal under Section 19 as in *Mobile* or affirmance as in *Memphis*, there is at all times an outstanding Commission action under Section 4 under which some *specific* rate is effective as the filed rate for every regulated sale, as a result of Commission exercise of its duties and jurisdiction under that section of the statute.

4. The courts below apparently were under the impression that change to a different rate *level* in cents per Mcf, such as Cities seeks, would be possible without compliance with Section 4(d) and the Regulations (18 C.F.R. § 154.94 (a) and (c)). Under that view, the filed rate presumably could be changed automatically or collaterally without a tender of the new rate to the Commission and its action thereon. This is forbidden both by the Regulations and the Act, long construed by the federal courts and the Commission itself to mean that the filed rate, a specific figure in cents, can not be changed to any other figure or rate *level* except after action by the Commission, as permitted by Sections 4 and 5.

For Commission rulings, the courts below were referred to a Commission order rejecting tender of a rate increase specifically provided by a contract, because the tender was conditioned upon possible invalidity of a prior higher rate already on file (R. 703, 705, 706, 707-725). In its rejection of the tender, the Commission held (R. 705):

> " . . . there can be only one effective rate for the gas sold within the meaning of Order No. 174-B, and because Section 4(d) of the Natural Gas Act requires that any change in rate state plainly the change to be made and the time when the change will go into effect. The conditional nature of your rate change filings do not meet this requirement."

The courts below also were referred to the Commission construction that once a tendered rate is accepted for filing under Section 4, that rate may not be set aside collaterally or retroactively. For example, in *Re Tennessee Gas Transmission Company*, 14 F.P.C. 860 (1955) (R. 726-733), with reference to tendered rates so accepted for filing as here *without* condition or suspension, the Commission held:

> "There is no valid distinction between rates made effective under different circumstances. The basic underlying fact is that they are presently effective rates in either instance. Such rates may not be attacked collaterally." (R. 728-729)
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> "The producer-suppliers rates, the reasonableness of which intervenors seek to probe here, are rates and charges which have become effective pursuant to filed rate schedules. The rates set forth in the effective rate schedules are legal rates. They represent the only rates which the producer-suppliers to Tennessee may charge, and which Tennessee may pay. Such rates being fixed and certain cannot now be changed except in proceedings instituted under Section 5(a) of the Natural Gas Act." (14 F.P.C. at 861-862 and R. 732).

The Courts of Appeals also construe the Act to mean that even though under contract law a "right" to a price by "operation" of some contract clause may be claimed collaterally, such "right" is not legally controlling because the specific filed rate, then effective under the Act, remains binding. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (5th Cir. 1947), *cert. den.*, 332 U.S.

770 (1947). See also *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (10th Cir. 1956), *cert. den.*, 352 U.S. 911 (1956). After *Mobile*, the Courts of Appeals have reached the same conclusion, even where it has been urged that under *Mobile* the rate to be charged may be changed to a different contract price without the filing of a change of rate under Section 4(d). *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958); *Episcopal Theological Seminary* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den., sub. nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895 (1959).

In the latter case, the Court of Appeals construed Sections 4(c) and 4(d) to control "the then applicable rate" at the time of filing, and that any other prices, even though stated in some contract already on file, can *never* become effective without prior compliance with filing requirements because ". . . forehanded contractual provisions cannot modify the regulatory provisions of the Act . . ." (269 F. 2d at 233). The court concluded that *Mobile* could not be interpreted to mean that a change from the effective rate to a price applicable under a contract would be lawful in the absence of filing of the formal change of rate under the Act (269 F. 2d at 235):

> "As we indicated above in considering the regulations we think there was a change in rate. It was an agreed-upon change if is true. And although the original schedule foretold the coming of the change, it took an amendment [to the schedule] to advise the public and the Commission that the new rate was going into operation. We see nothing in the Mobile or Memphis cases that hold otherwise."[16]

[16] The court was speaking of a twenty-year contract embodying a series of prices to be charged at specific intervals. The sellers argued that the rate initially accepted for filing and made effective (13 cents per Mcf) could be changed to the next higher price set

5. Below, Cities urged that the rate so made effective by acceptance and filing not be treated as legally binding collaterally, if such a rate has not also been "approved" as "reasonable" by the Commission. The courts adopted this novel narrowing of the bar to collateral attack, apparently because in filing a tendered rate, the Commission customarily cautions that it is not thereby "approving" the accepted rate or claimed contract provisions. The courts wholly failed to note that the *same* orders prohibit change of the *level* of the accepted rate except by exact compliance with the Act and Regulations (R. 640, 654).

The dichotomy between an "accepted" and filed effective rate and a rate "approved" as reasonable under a statutory standard is, of course, familiar in regulatory law.[17] The reservation of "approval" at the time of acceptance and filing has never meant that a rate so accepted and filed by the Commission can be overturned collaterally. That the court below erred in so concluding is shown by the holding in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), that a rate "accepted" and "filed" by the Commission after tender is binding as the legal, filed rate and immune to collateral revision, just as is a rate that has been "approved" as

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forth in the escalation schedule (13.5 cents per Mcf) without filing with the Commission. Regardless of what prices had thus been agreed-upon by buyer and seller, the Court of Appeals' decision was that both buyer and seller would remain legally bound by the 13 cents rate already accepted and filed by the Commission, and the next higher price stated in the contract clause could never become "effective" by "operation" of the contract, but only at such time as *that* price was made effective as the filed rate after tender and Commission action under Section 4.

[17] *Cf. Ambassador, Inc.* v. *United States*, 325 U.S. 317, 325 (1945); *Dayton Coal & Iron Co.* v. *Cincinnati, N.O. & T. P.R. Co.*, 239 U.S. 446, 450-451 (1915); *Cumberland Tel. & Tel. Co.* v. *Railroad and Public Utils. Comm. of Tennessee*, 287 Fed. 406 (M.D. Tenn. 1921); *State ex rel. Standard Oil Co.* v. *Department of Public Works*, 185 Wash. 235, 53 P. 2d 318 (1936).

"reasonable," or "fixed" by the Commission after determination of "reasonableness", under a statutory standard (341 U.S. at 251-252, 255-256.)[18] Acceptance for filing under Section 4 thus is an action conclusively establishing the rights of the parties to a specific rate, unless set aside

[18] The irony of the ruling below is shown by the obvious historical origin of the carefully worded statements of the Commission. Language reserving "approval" is *not* used to state that "acceptance" has no significance, but to prevent a company from later asserting that "acceptance" *also* constitutes a finding that a tendered rate is "reasonable," and is a bar to a subsequent adjudication of "reasonableness" of the accepted rate. In the early days of administration under the Act, contention was made that acceptance for filing of an affiliate's rates relieved a company of any burden, in a subsequent rate proceeding, to establish "reasonableness" of payments made at the filed rates of the inter-company affiliate. The legal significance of "acceptance," and "approved" as "reasonable," respectively, were then established. *Re Home Gas Company*, 2 F.P.C. 402, 409 (1941). Out of such disputes also came the holdings that the only rates a company may legally charge are rates filed with the Commission, whether "approved" as "reasonable" or not, and such accepted rates are binding upon a company and its customers until changed under the statutory procedures. See *City of Cleveland* v. *Hope Natural Gas Co.*, 3 F.P.C. 150, 187 (1942), and *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, 311 (4th Cir. 1943), rev'd, other grounds, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). More recently, in producer regulation, a contention was made that "acceptance" for filing of a rate under temporary authorization, prevented the Commission from thereafter imposing a condition, to operate prospectively, in issuing a certificate under Section 7 of the Act. See *Re Cities Service Gas Company*, 14 F.P.C. 134 (1955). Upon review of this question, the Court of Appeals held that "acceptance" did not bar such subsequent imposition of "reasonable" conditions, to operate prospectively, but also found that under the *Montana-Dakota* rule, during the period the temporary authorization operated, the "accepted" rate, whether "reasonable" or not, was the "only legal rate" and no other "rate could have been charged. . ." *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956).

on direct review or until changed by further proceedings under Section 4 or 5."

Accordingly, the action of accepting tendered rates for filing is by order under Section 4 (see *Continental Oil Co. v. Federal Power Commission*, 236 F. 2d 839, fn. 3, 841, 842 (5th Cir. 1956)), which is final and reviewable *because* of this binding effect.

This is illustrated by *Cities Service Gas Co. v. Federal Power Commission*, 255 F. 2d 860 (10th Cir., 1958), *cert. den. sub. nom., Magnolia Petroleum Co. v. Cities Service Gas Co.*, 358 U.S. 837 (1958). That case reached the court under Section 19(b), *after* Cities pursued its administrative remedies and applied for rehearing under Section 19(a) upon Commission action under Section 4 accepting and filing a tendered rate of 11 cents per Mcf, accompanied by a schedule including a contract and the Kansas minimum price order (See R. 657-667, 669-678, 682-692). Dismissal of the review proceeding was urged on the ground that Cities was not "aggrieved" by Commission acceptance of the 11 cents rate for filing, and that the Commission's action, therefore, was not reviewable. The Court held that such acceptance for filing under Section 4 was final and legally binding unless set aside on review (255 F. 2d at 863):

> "The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process. *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F. 2d 51, certiorari denied *Japan Atlantic and Gulf Conference v. United States*, 347 U.S. 990, 74 S. Ct. 852, 98 L. Ed. 1124."
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> ". . . Petitioner has been compelled to pay eleven cents for its gas, and wrongfully so, because the Commission's acceptance of the rate schedule was pro forma the acceptance of the rate then being paid. To assert that petitioner's aggrievement lay with the invalid Kansas Corporation Commission order and not with the Power Commission's acceptance of Schedule

> 26 [Kansas minimum price order] is but to play with words. . . . petitioner's complaint lies in the action of the Power Commission in accepting a rate schedule which was not the effective rate on the critical date . . ."

Commission action in unconditionally accepting the tendered rate of 11 cents per Mcf for filing (R. 693, 697)—even though as here there was the usual reservation of "approval" as to "reasonableness" (see R. 694-695)—was correctly held to determine the only rate the seller would be authorized to charge thereafter. Unless Cities immediately obtained timely judicial review of this Commission action under Section 4, Cities would be bound thereby to pay that rate, and the controlling legal relationship between the filing company and Cities thereafter thus fixed at the filed rate of 11 cents per Mcf. Regardless of any preexistent contract or state order, Cities' "aggrievement," as Cities itself there urged (see R. 684, 691), flowed from the action of the Commission under Section 4.

6. Thus, the courts below erred in failing to recognize (1) that exercise by the Commission of its jurisdiction under Section 4 necessarily included determination of whether to accept or reject Petitioner's rate when tendered under that section; (2) that such Commission action of acceptance and filing under Section 4 is conclusive and always binding collaterally; and (3) that the definite, specific filed rate thereby made effective under the Act, is the only legal rate until changed to a different rate *level*, which can only be done through statutory procedures.

Under the Act, once the rate has been so accepted as the filed rate, that rate thus can never be modified by "private agreement" without recourse to the Commission, and then modification may be prospective only. While the parties might agree, by one means or another, that a different rate be applicable thereafter, the new rate could not become effective under the Act, and could therefore not be legally charged or collected, until that specific

rate had become the filed rate by being tendered for the required period; by being accepted for filing and filed; and by the failure of the Commission to suspend it or, after suspension, by being placed in effect subject to refund. As a result of Commission actions under Section 4, it is not only possible but increasingly frequent for a contract, either in original form or as amended, to state some price which is different from the actually effective filed rate. Under such circumstances, the statute does not permit buyer and seller to do business on the basis of a contract price. The filed rate still governs.[19] Otherwise, all of the Commission's duties and powers under Section 4 would gravitate directly into the hands of private persons and into courts of general jurisdiction, including state courts, and certainty heretofore drawn from the specific rate effective by Commission acceptance and filing would be destroyed.

The Commission's formal determinations in 1955 and 1957 to accept Petitioner's tendered rates of 11 cents and 11.0715 cents for filing, and to permit those rates to become effective under Section 4, are not now open to any collateral modification. In Cities' own private view, the Commission's public acts may be considered erroneous, but the Commission's public records for the past five years cannot simply be destroyed and the actions under Section 4 so erased. The statute precludes this, and Petitioner's filed rates under Section 4 are binding upon both buyer and seller for the periods in dispute, and must remain so until changed as the statute permits.

[19] See Cities' own recognition in May, 1955, that the filed rate effective by Commission action is the only rate a seller legally may charge, and the only rate Cities is legally obligated to pay (R. 760-761).

C. Commission acceptance and filing of a tendered rate may be set aside only under Section 19(b) of the Act

Section 19(b) vests in the United States Courts of Appeals exclusive jurisdiction to set aside or modify any Commission action of acceptance and filing of a tendered rate. When the courts below presume to declare Commission action "null," they usurp that jurisdiction and strip Commission action of administrative and statutory finality. This is directly contrary to the reasoning of the federal Courts of Appeals in considering relation of the *Mobile* case to statutory provisions for agency and judicial jurisdiction.

1. The exclusive provisions for review under Section 19(b), and the binding effect of Commission actions collaterally, do not ebb and flow with views of private persons as to whether the Commission may have erred. "Whether correct or incorrect its determination [can] not be attacked collaterally." *Northwestern Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F. 2d 19 (8th Cir. 1950), aff'd *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951).[20] Thus, in timely review under Section 19(b), the Commission ultimately was held incorrect in *Mobile* and correct in *Memphis*, but in neither case was it even intimated that protestants could have ignored the Commission's actions accepting tendered rates or overturned those actions by attack, years later, in state courts. Similarly, in the matter reviewed in *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170 (1960), the protesting seller could not have ignored Commission action by charging a rate the Commission had rejected, even though buyer and seller had agreed upon the rejected price in a contract; and the buyer and seller in dispute

[20] See also *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Butte A. & P. Ry. Co.* v. *United States*, 290 U.S. 127 (1933); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940).

over the rate reviewed in *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960), could not have overturned the Commission's conclusions upon the rate to be accepted for filing, by means of collateral suit upon their respective theories.

All protestants were required to proceed in timely manner to the Courts of Appeals and this Court under Section 19(b), or Commission action otherwise would have become final and unassailable collaterally.

2. The federal courts correctly have not endorsed collateral attacks, such as Cities has mounted upon the premise that they were authorized by the *Mobile* holding. The reasoning in two cases is illustrative.

Pertinent background of the *Mobile* case was considered in *Tyler Gas Service Co. v. Federal Power Commission*, 247 F. 2d 590 (D.C. Cir. 1957). The Commission there sought to distinguish *Mobile* on the ground that the buyer in the *Tyler* case had acquiesced in the *first* "unilateral" change of a rate accomplished by the seller's filing of the conversion tariff, and therefore could not object to a *subsequent* "unilateral" increase in the effective rate. In the ruling on this contention, reference was made to the history of the *Mobile* case. As disclosed by the opinion of the Third Circuit (215 F. 2d 883) when *Mobile* was before it, the contract between United and Mobile originally provided for a percentage rate equal to 80% of Mobile's gross resale revenues up to 41,667 Mcf per billing month, and 90% in excess thereof. There was no provision in this contract for changing the price, and the contract was filed as a rate schedule under the Act. In July, 1952, without protest by Mobile, United tendered and the Commission accepted and filed as a supplement to United's rate schedule, a unilateral change of United's rate to Mobile substituting 10.7 cents per Mcf in place of the percentage rate. This rate of 10.7 cents was not the same in amount as the percentage rate. Thereafter, on June 24, 1953, United

tendered, and the Commission accepted, another unilateral change in the rate for Mobile, which purported to change the 10.7 cent rate to 14.5 cents per Mcf. Mobile protested against the acceptance of the 14.5 cents filing and ultimately perfected a timely appeal therefrom. The Third Circuit then held that while Commission acceptance, without protest by Mobile, of the unilateral change in rate to 10.7 cents *had* made that rate the filed rate, Mobile was not thereby deprived of its right to protest *subsequent* unilateral changes. Respecting this situation, the Court of Appeals for the District of Columbia in the *Tyler* case noted, "Mobile acquiesced in the conversion tariff and was thereafter billed at and paid the conversion rate until United applied for an increase in its industrial rate and the Commission ordered the increased rate paid. It was this increased rate, absent a finding that the contract rate was in conflict with the public interest, which the Supreme Court ruled a nullity." (247 F. 2d at 593).

Thus, the first supplement to its rate schedule which United tendered and the Commission filed, changing the filed rate for the sale to Mobile from the percentage rate *to* 10.7 cents per Mcf, obviously had no force and effect under common law as a contract or otherwise. That document which by acceptance and failure to protest, became a part of a rate schedule under the Act, was as "unilateral" as United's subsequent supplement to change the rate *from* 10.7 cents *to* 14.5 cents. Nevertheless, this Court in *Mobile* recognized that this first tender by United, "unilateral" though it had been, by becoming without protest a part of United's rate schedule under the Act, had become the filed rate, and, as such, had to be observed by the parties. That supplement derived its force and effect from the statute; there was no other source from which it could have derived effectiveness. In *Tyler*, the court's analysis of both *Mobile* and the case before it thus was clear: the *first* "unilateral" rate, after the failure of the buyer to protest, became final as the filed

rate, superseding an original "contract" price, and was binding and effective while in force, even though a *subsequent* "unilateral" increase in rate level, protested at the Commission and reviewed in timely manner under Section 19(b), could be set aside.

The *Mobile* decision was similarly reviewed in *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F. 2d 90 (D. C. Cir. 1957). A purchaser there took the position that despite intervening Commission actions, the *Mobile* opinion meant that the only proper rate was one set forth in a contract signed in 1931, some twenty-six years earlier. In defense of Commission actions, the seller asserted that between 1931 and the date of the *Mobile* holding, various superseding rates had become effective as a result of Commission actions in 1946, 1952, 1953, and 1954, and that the purchaser had not then opposed these filed rates, and had made payment thereon. The Court of Appeals, after reference to *Mobile*, concluded that even though some of the tendered rates after 1931 had been "unilateral," the purchaser "may nevertheless be bound by the change if it offered no opposition and has since acquiesced." (247 F. 2d at 94). Finding the record insufficient as to specific actions of the Commission and of the belated protestant between 1931 and 1957, the court remanded the case for findings *inter alia*, as to whether the purchaser had become "estopped by acquiescence, or otherwise to question the substitution." (247 F. 2d at 94).

The court did not undertake, as apparently the Delaware courts would, simply to compare a 1931 contract and the *Mobile* holding, and then say that all Commission actions, even though *not* protested at the time entered and *not* reviewed in timely manner under Section 19(b), were simply "nullities." To the contrary, the court made very clear its conclusion that under the Act, acquiescence and failure of the buyer to protest a filing in timely manner, would preclude collateral attack, years later, upon Commission action.

3. Similar construction appears in two cases considered below only with respect to state pricing orders, and not to more relevant conclusions as to timely review under Section 19(b).

In the first, *Natural Gas Pipe Line Company of America v. Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958), *cert. den.* 357 U.S. 927 (1958), the court had before it under Section 19(b) a complex dispute arising out of a tender of a rate. In October, 1954, a seller tendered a copy of a contract and, as a supplement, a copy of an Oklahoma 9.8262 cents minimum price order. The buyer *immediately* protested, and the Commission accepted the filing upon the "condition" that the state order be upheld in then pending litigation. In the next month, the seller tendered an increase in rate to 10 cents per Mcf, but the Commission suspended the change and ordered a hearing under Section 4(d). Thereafter, upon motion of the seller, the Commission permitted the increased rate of 10 cents to become effective subject to a bond covering refund of any portion of the increase subsequently found unreasonable. Because this bond covered only the difference between the rate of 9.8262 cents and the 10 cents rate, the buyer *immediately* sought an increase in the bond. At about this time, the Oklahoma order was held invalid, but after hearing upon the amount of the bond, the Commission held the bond sufficient. Meanwhile, in December, 1955, the seller had tendered a new rate equal to the rate under protest (9.8262 cents) and by letter order the Commission unconditionally accepted this rate to be effective on January 27, 1956. The buyer *immediately* also filed objection to filing of this rate. Rehearing was denied, and upon review under Section 19(b) of all of the orders involved, the Court of Appeals held that under the condition imposed by the Commission, the original tendered rate of 9.8262 cents must be lowered to a precedent contract price. More pertinent, however, to the question of jurisdiction to set aside Commission action, was the court's consideration of the neces-

sary and timely attack by the buyer upon the Commission's action in accepting the last rate of 9.8262 cents tendered by the seller in December, 1955. Before the court, it was contended that the buyer could not be "aggrieved" by acceptance of this rate. The court, however, found that even if all of the previous orders were reversed by it, and this later action by the Commission was left outstanding, "it could and probably would be claimed that the February approval established a sound nine cent rate from January 27, 1956, when the 30-day notice time elapsed." (253 F. 2d at 9). The court thus concluded that the buyer correctly and immediately protested this last letter order of acceptance, and was correct in immediately petitioning for review under Section 19(b). Otherwise, in the absence of the timely judicial reversal of this last Commission action, buyer and seller would be bound by the rate accepted and made effective by that action.

The second case involving both filed rates and a state order is *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), *cert. den sub. nom. Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958); which, because of emphasis below, also requires reference to chronology. That case, a review under Section 19(b), dealt with acceptance and filing of a rate of 11 cents per Mcf. The seller, in tendering the rate of 11 cents per Mcf to the Commission for acceptance and filing, had submitted with its tender a contract with Cities and the Kansas minimum price order (R. 658, 662-663). Cities immediately filed a protest of the 11 cents rate, urging rejection (R. 659-667, 669-678). In the light of Cities' protest, the Commission, on March 21, 1957, accepted the tendered rate subject to the clearly expressed condition that acceptance was without prejudice to claims of either seller or buyer in litigation over the rate (R. 680). Both seller and Cities immediately applied for rehearing under Section 19(a) (R. 683-692, 697), and on May 17, 1957, the Commission modified its original action, removed

the condition, and accepted for filing without qualification (except for the customary reservation of "approval," R. 694), the contract and minimum price order as the seller's rate schedule and 11 cents as the seller's rate (R. 697-698).

Under Section 19(b), Cities filed its petition for review of the Commission's action. In that review proceeding, Cities itself urged that acceptance for filing of a rate schedule consisting of the contract and minimum price order constituted acceptance of a rate schedule providing for an 11 cents filed rate; that acceptance of such rate schedule constituted a construction thereof by the Commission that the rate schedule provided for an 11 cents filed rate; and that such acceptance also constituted a *final* determination by the Commission that the seller's June 7, 1954 filed rate was 11 cents per Mcf. (See 255 F. 2d at 862).

The court fully agreed with Cities, concluding that as a result of the Commission's acceptance, and as long as that action was outstanding, Cities was compelled under the Act to pay the 11 cents per Mcf as the filed rate. The court rejected the view that Cities' "aggrievement" could be said to derive from contract or a state order, its "complaint" lying in the action of the Commission in accepting the seller's 11 cents rate for filing and the state order as a part of the rate schedule to be effective under the Act. (255 F. 2d at 863). Regardless of remedies available in other litigation, Cities' ". . . rights to redeem excess payments made subsequent to the Commission action" would be "imperiled" by "the existence of the outstanding Commission order." Therefore, the court reviewed the merits of Cities' protest and set aside Commission action, but, in so doing, made clear that the remedy for the protestant of a tendered and accepted rate lies exclusively under Section 19(b), and not in some later, collateral action.

Cities thus, had pursued the *only* permissible administrative and judicial avenues to contest and to set aside such Commission action accepting and filing a tendered rate.

Sections 19(a) and 19(b) consistently have been construed to mean that *all* objections to validity of Commission action must be made in the manner prescribed by those sections. If objections are *not* raised under these procedures, they may not be asserted, and Commission action becomes final and unreviewable. See *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635 (1945); *Cf. Service Storage & Transfer Co.* v. *Commonwealth of Virginia*, 359 U.S. 171 (1959).

4. The state courts, however, apparently read *Mobile* as authorizing a different, ex-statutory procedure for modification of Commission acts.

This reading seemingly derives from reference in *Mobile* to *Baltimore & O. R. Co., et al.* v. *United States, et al.*, 279 U.S. 781 (1929), but the latter case could *not* have been cited as supporting a theory that an action for "restitution" may be maintained independently of review under statutory procedures. In the first "phase" of the *Baltimore* case, suit before a three-judge court to set aside an order of the Interstate Commerce Commission had been dismissed "for want of equity," but this Court reversed, directing further proceedings. Thereafter, appellants applied in the District Court for a decree in conformity with this Court's mandate, and also prayed restoration of charges paid to comply with the Commission's order up to the time of this Court's reversal. The three-judge court then set aside the Commission's order and made findings as to appellants' compliance therewith while it was in effect, but denied restitution. This Court then reversed that denial on the ground that the three-judge court, having juris-

diction to set aside the Commisison order, had jurisdiction which "necessarily includes power to make all orders required to carry on such suits and to *enforce the rights and liabilities of the parties that arise in the litigation.*" (279 U.S. at 785, emphasis supplied). While the "subject of the controversy and parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done," but this is not authority for the proposition that *without* recourse to the three-judge court, as required to have the commission order set aside, the commission's order could have been attacked collaterally in a state court in an independent action for "restitution." Rrerequisite was reversal of commission action, and jurisdiction to order "restitution" then was wholly ancillary to jurisdiction to review and set aside that order. See also *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U.S. 301 (1935).

Here, timely reversal under Section 19(b) would be such a condition precedent to any claim for "restitution." The Commission, like any other body, could act in a manner that one person or another later deems erroneous, but such "error" could not "transcend" jurisdiction. See *Butte, A. & P. Ry Co.* v. *United States*, 290 U.S. 127 (1933); *NLRB* v. *Pappas & Co.*, 203 F. 2d 569 (9th Cir. 1953). Having primary jurisdiction over the subject matter—the rate for a regulated sale—the Commission necessarily exercises that jurisdiction to apply the specifics of its regulatory power to any given set of facts. When it does so, any of its actions are subject to timely review, but obedience of all Commission actions is required by statute as long as its orders are in effect. Its actions cannot be treated as "void" collaterally, even if one person or another claims agency action may have been at one time "voidable" in a proper review proceeding. *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U.S. 301 (1935); *United States* v. *Morgan*, 307 U.S. 183, 195-198 (1939).

A state court cannot now so exercise the jurisdiction Section 19(b) vests exclusively in United States Courts of Appeals. As this Court has stated with reference to comparable procedures under the Federal Power Act, where Congress prescribes an exclusive procedure for questioning acts of the agency, such questioning must be done as prescribed by statute, or *not* at all. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958). "Such statutory finality need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." (357 U.S. at 336-337).

II. THE STATE COURT HAS ERRED BY ASSUMING JURISDICTION TO SET ASIDE A FILED RATE COLLATERALLY, AND TO ENFORCE A DIFFERENT PRICE AS THE RATE FOR A REGULATED SALE.

In the face of this exclusive primary jurisdiction of the Commission under Section 4 (pp. 25 through 37, *supra*), and of the Courts of Appeals under Section 19(b) (pp. 38 through 47, *supra*), the state courts nevertheless have proceeded with a process of synthesis under which filed rates of 11 cents and 11.0715 cents would be changed by a state court to a "rate" of 8.4 cents enforceable in a state court. Section 22 of the Act further precludes such jurisdiction in a state court.

A. Jurisdiction to enforce claimed rights and liabilities in a sale covered by a filed rate is vested exclusively in the United States District Courts

Section 22 provides in pertinent part,

> "The District Court of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive* jurisdiction . . . of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder." (Emphasis supplied).

The state court recognized that the filed rate is the *only* binding legal rate, and that that rate may not be changed by a court collaterally (R. 8, 18). This alone should have compelled the conclusion that a state court, because of Section 22, could have no jurisdiction to do what Cities sought to have done.

I. At the outset, the state court was on notice as to challenge of its jurisdiction, and the question of federal jurisdiction over Cities' original actions immediately was tested in a companion case. The federal court, looking only at the face of the initial complaint under the federal removal rule, remanded to the state court, but concluded that the question of whether the state court itself lacked jurisdiction of the subject matter, in the light of the Natural Gas Act, was to be decided by the latter court in the first instance after remand. (See *Cities Service Gas Co.* v. *Skelly Oil Co.*, 165 F. Supp. 31 (D.C. Del. 1958)).

Having thus successfully withstood removal, Cities then pressed for judgment, but in the process discarded, one by one, the "common law" veils which shrouded the subject matter initially. By amendment of its complaint, it submitted facts showing that under *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), Petitioner's sale and rates must be subject to the Natural Gas Act (See R. 619-620). In moving for summary judgment, it relied upon the filed rate schedule, and, although discussing its original theories, laid bare what it sought in a state court (R. 764, 766):

> "Plaintiff seeks merely to enforce its right to a refund of payments made in excess of the contract rate which is necessarily the same rate as is fixed in its rate schedule. *There can be no question but that a court of general jurisdiction has the duty to* construe, apply and *enforce defendant's rate schedule.*" (Emphasis supplied)

Under the heading "[t]he law permits no deviation from defendant's filed rate of 8.4 cents per Mcf," Cities then set forth its claim that 8.4 cents per Mcf (at 16.4 p.s.i.a.) is the "filed rate," and that this rate "fixed by defendant's rate schedule is binding upon plaintiff and defendant and upon this court with the force and effect of federal statute." (R. 767). Cities further alleged that after the court had "determined what rate is fixed by defendant's rate schedule, the Court is bound, as a matter of law, to enforce this rate." (R. 770). Similarly, in contesting Petitioner's motion challenging jurisdiction of the court, Cities made very plain that the filed rate was the subject matter of the controversy and what it sought in the state court (R. 771, 775), and ultimately took the position that "even assuming *arguendo*, only that defects exist in plaintiff's complaint, such defects have been cured and supplied by defendant's own allegations." (R. 777-778).

The trial court thereupon correctly concluded that all parties were in agreement that the only legal rate is the filed rate; and recognized this to be the law (R. 18), but failed to make the conclusion Section 22 then required. The subject matter was not sheltered by technics employed in drafting of an original complaint, as on removal.[21] Recognizing that a state court, considering *both* complaint *and* answer, may have difficulty in determining whether "the subject matter" is "withdrawn from the state," this Court has long cautioned state courts that where the facts show that the controversy falls within the scope of a federal statute, "the state court must decline jurisdiction in deference

[21] "Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U.S. 377, 382 (1922); *Cf. Smith* v. *McCullough*, 270 U.S. 456 (1926); *Peyton* v. *Railway Express Agency*, 316 U.S. 350 (1942); *Norton* v. *Larney*, 266 U.S. 511 (1925); *Molnar* v. *National Broadcasting Co.*, 231 F. 2d 684 (9th Cir. 1956); *Realty Holding Co.* v. *Donaldson*, 268 U.S. 398 (1925).

to the tribunal which Congress has selected for determining such issues in the first instance.". *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955). Here, under Section 22, the federal courts are such a tribunal.

2. To accord Cities relief under any theory, the state courts found that they first were required to declare outstanding Commission actions upon the very rates in question to be "nullities." (R. 19, 45). *Cf. Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad Co.*, 258 U.S. 377 (1922); *Simpson* v. *Southwestern Railroad Co.*, 231 F. 2d 59 (5th Cir. 1956), *cert. den.* 352 U.S. 828 (1956). In the face of such revelations that is, that the subject matter of dispute and of plaintiff's claim is a rate subject to Commission jurisdiction and the provisions of the Act the state courts seem to seek to avoid the ban of Section 22 by claiming a residual "jurisdiction" deriving from a precedent contract or an ancillary, alleged, unfiled agreement. At best, such jurisdiction, in theory, could only be "concurrent" with plenary federal jurisdiction over the rates thereinf; and at worst, a state court could not in practice avoid intruding upon federal jurisdiction, as is the case here. The conclusions of the Delaware courts are thus in marked contrast to those of the Supreme Court of the State of Mississippi in holding that the Act leaves no room for such "residual" jurisdiction in a state court. *United Gas Pipe Line Co.* v. *Willmut Gas & Oil Co.*, 231 Miss. 790, 97 So. 2d 530, 535-536 (1957), *cert. den.* 357 U.S. 937 (1958).

Obviously, under the Act, contracts may be negotiated, but the Commission's exclusive jurisdiction attaches when a rate is on file with the Commission under Section 4, and Sections 19 and 22 of the Act then also are paramount. Whether the rate *level* thereafter, is, or should be, one figure or another is not for a state court to say. Sections 4 and 19 establish other fora, and in Section 22, Congress has defined the exclusive forum for enforcement of rights or liabilities of buyer or seller, as defined by the filed rate.

Cf. Wicks v. Swan, 346 U.S. 427 (1953).[22] Even if a court may examine, at the threshold, the question of power to hear and determine a controversy as presented, when it is shown that power to do so is not conferred upon that court, or is excluded by statute, then that court "lacks jurisdiction of the subject matter and must refrain from any adjudication of rights in connection therewith." *In Re National Labor Relations Board*, 304 U.S. 486, 494 (1938).

The subject matter being committed to the exclusive jurisdiction of a federal agency and the federal courts under Section 22, the state court cannot proceed. Questions of what may now be the power of the Commission and the federal courts, respectively, over claims as to past rates, or rights or liabilities for "restitution" or "overpayments," cannot be decided by the state court.

B. Exercise of jurisdiction by the state court destroys the comprehensive scheme of federal regulation

This Court held that producers' rates are subject to exclusive, primary jurisdiction of the Commission, and that commissions of states of production may not exercise jurisdiction over rates for the same sales because of such federal pre-emption. *Cities Service Gas Co. v. State Corporation Commission of Kansas*, 355 U.S. 391 (1958); *Natural Gas*

[22] Thus even if it were assumed that the *level* of a filed rate is exactly the same level as a price set forth in a contract or stated in a collateral unfiled agreement (which is not the case here), a state court still would not be empowered to enforce rights under that rate. "Coincidence" of such facts would not mean that the state court had jurisdiction; enforcement of rights under the rate still could only be in a federal court under Section 22. *Cf. Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956). In *Charleston and Western Carolina Railway Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915), it was said that when Congress "has taken the particular subject-matter in hand, coincidence is as ineffective as opposition and a state law is not to be declared a help because it goes farther than Congress has seen fit to go."

Pipe Line Co. v. *Panoma Corp., et al.*, 355 U.S. 391 (1958). A state court is likewise excluded.

1. Sections 4, 19, and 22 thus prescribe a single federal rate regulatory scheme, comprehensive in scope, detailed in application, and operative under procedures and timing required by the Act and Commission regulations. Collateral actions such as those entertained below can only intrude upon and nullify the statutory and administrative procedures, *regardless* of what theory the state court claims to apply. Consequences of "concurrent" jurisdiction by the state courts over rates regulated by the Commission can only be those well foretold in a similar context:[23]

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal board, precludes state courts from doing so. *Cf. Muers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 359, 82 L. Ed. 638; *Amalgamated Utility Workers* v. *Consolidated Edison Co. of N. Y.*, 309 U.S. 261, 60 S. Ct. 561, 84 L. Ed. 738. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal board also exclude state courts from like action. *Cf. Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234."[24]

[23] *Garner* v. *Teamsters, Chauffeurs and Helpers*, 346 U.S. 485, 490-491 (1953).

[24] See also *Garner* v. *Teamsters, Chauffeurs and Helpers, supra*; *Local Union Number 25* v. *New York, New Haven & Hartford Railroad Co.*, 350 U.S. 155 (1956); *Local 24 of International Brotherhood of Teamsters, etc.* v. *Oliver*, 358 U.S. 283 (1959); *Pennsylvania Railroad Co.* v. *Day*, 360 U.S. 548 (1959); *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601 (1959); *Slocum* v. *Delaware L. & W. R. Co.*, 339 U.S. 239 (1950); *Williams* v. *Lee*, 358 U.S. 217 (1959); *Farmer's Educational & Cooperative Unions* v. *WDAY, Inc.*, 360 U.S. 525 (1959). As stated in *Bethlehem Steel*

In this case, enforcement of *any* claim with respect to the rates by the state court would superimpose coercive authority of the State and its law upon subject matter which the Act has placed within the exclusive jurisdiction of the Commission and federal courts. In *San Diego Building Trades Council etc. v. Garmon*, 359 U.S. 236 (1959), specific attention was given to what inevitably follows in such an area of exclusive federal jurisdiction when state courts thus entertain and enforce claims, even if considered to be grounded upon state law at the outset (359 U.S. at 247):

> "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

2. Cities' actions apparently rest upon a proposition that because it once obtained reversal of one Commission action accepting and filing an 11 cents rate, upon timely review under Section 19(b), the substance of that one decision is authority for later state court declarations that other Commission actions, in other matters involving different facts, are now "null." This obviously does violence to all of the statutory proscriptions of jurisdiction. *Cf. Watab Paper Co. v. Northern Pac. Ry. Co.*, 154 F. 2d 436 (8th Cir. 1946). The state courts cannot be a proper forum for such attack upon federal agency action, whether assertion of invalidity

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Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947), exclusion of state action may be implied from the nature of federal regulation and the subject matter involved, even though an express declaration is wanting, because permission of even concurrent jurisdiction must be withheld where the necessity of federal action is paramount.

of federal action rests upon a claim of substantive or of procedural error; and such an attack clearly is not only collateral, but also premature, where administrative and statutory remedies have not been exhausted. See *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953); *Service Storage & Transfer Co.* v. *Commonwealth of Virginia*, 359 U.S. 171 (1959). *Yakus* v. *United States*, 321 U.S. 414 (1944).[25]

The plaintiff below has long known that its remedies lay before the Commission initially, and then through the review procedures of Section 19. See *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958). Nevertheless, despite the additional restriction of Section 22, it has mounted collateral attacks in state courts of "general" jurisdiction with complaints initially alleging that an unfiled "contract" has been formed by what, in fact and law, at best could be but a unilateral announcement by Cities that it claimed that the payments which it had decided to make of a state minimum price were involuntary, and an offer on Petitioner's part to agree to refund *without* interest any such overpayments, which offer was *not* subsequently accepted by Cities. Then, these initial allegations fade as plaintiff seeks an adjudication that the filed rate is different from that which the Commission accepted and filed years earlier, and asks a state court to enforce that "filed" rate, even though the Act forbids such

[25] See also *United States* v. *Balogh*, 329 U.S. 692 (1947); *Evans* v. *United States*, 252 F. 2d 509 (9th Cir. 1958); *Miller* v. *United States*, 242 F. 2d 392 (6th Cir. 1957); *Smith* v. *Sherrard*, 208 F. 2d 180 (Emergency Court of Appeals 1953). In the proceeding below, Cities set forth various facts as to actions of the Commission upon its own rates. Such rate matters, obviously, are for the Commission and federal courts to decide. Cities also recited equitable considerations said to be in its favor, and Petitioner submitted the equities in its favor (R. 620, 629, 633-634), but these, too, are not for the Delaware court to weigh.

acts, and such "judgment" would compel a regulated company to violate the Act by departing from the filed rate.

3. The obvious, practical impact may be briefly noted. Under the Act, hundreds of rates are tendered to the Commission by regulated companies, and are now effective after acceptance and filing under Section 4, to which both buyers and sellers must look for any certainty as to the legal rate. Recourse is had only to the Commission to make a change in the effective rate. At least until the Delaware courts assumed jurisdiction, it was not thought that any jurisdiction remained in a state court to override Commission actions or to serve as a forum in which private parties, by alleged unfiled agreements, could accomplish a rate change, depending solely upon how much validity a state court chose, in later years, to accord to Commission action.

Many regulated companies, Petitioner among them, from time to time have questioned the correctness of Commission decisions upon tendered rates and construction of a rate schedule. In some instances, such actions have been contested by timely review under Section 19(b), and the Commission's substantive decisions then have been affirmed or reversed,[28] but "concurrent" exercise of jurisdiction by state courts nullifies these review procedures of the Act, as well as the proscription of Section 22. The Act requires that filed rates be embodied in schedules open to public inspection, so that any affected person, by examination of the Commission's files, can ascertain exactly what rate is effective at any time for any given sale or service. It is upon this basis that rates are paid, that complaints as to reasonableness may be drawn, and that discrimination,

[28] *Cf. Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F. 2d 906 (10th Cir. 1958); *Kerr-McGee Oil Industries Inc.* v. *Federal Power Commission*, 260 F. 2d 602 (10th Cir. 1958); *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (10th Cir. 1956); *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (10th Cir. 1955).

preferences, or other prohibited practices may be determined. On this level of practicality, the Delaware courts' activity has an immediate impact. What those courts, in effect, do is assume jurisdiction to cancel and rescind the Commission's public minutes of 1955 and 1957, to strike out parts of a schedule filed in 1954 and 1957 and still in the public files by Commission action, and then enforce an alleged unfiled "contract" so as to change the effective rate level. Under the holding below, even this need not be the end. It could well be that some months or years hence Cities, or someone else, could bring forth from private files other papers alleged to be a different "contract" again changing the "filed" rate level, and a state court again might be prevailed upon to make still another rate effective for the sale. Under such a holding, rates filed by the Commission obviously would remain subject to any change through litigation in the trial and appellate courts of the states, and exercise of Commission jurisdiction over the rate is stripped of finality.[27]

One illustration should demonstrate better than words why the Delaware courts cannot exercise such jurisdiction. In the Magnolia Petroleum Company case (255 F. 2d 860), discussed on pages 43 through 45 of this brief, the United States Court of Appeals for the Tenth Circuit, acting in a timely statutory review proceeding under Section 19(b), did the precise thing the Delaware courts have attempted. The Tenth Circuit Court in that statutory review proceeding set aside an order of the Commission accepting an 11 cent rate for filing, and in so doing reinstated another price—exactly the jurisdiction the Delaware courts seek to

[27] Thus far, the Delaware state courts apparently are alone in claiming such jurisdiction, as the Mississippi Supreme Court has prevented collateral attacks upon filed rates. Final decisions on the question of jurisdiction have not yet been reached in litigation pending in the state courts of Iowa, Kansas, Nebraska, Oklahoma and Colorado. Pending cases were listed in Appendix J to Petitioner's "Petition for Writ of Certiorari," pp. 83a-85a.

exercise. In the Magnolia Petroleum Company proceeding, Cities exhausted the administrative remedies as required by Commission rules and regulations and Section 19(a) in timely fashion. Cities then contested the action of the Commission in accepting the 11 cent rate for filing by proceeding with timely statutory review under Section 19(b). It cannot now succeed in an effort to accomplish a similar objective in a collateral action, years later, in any state court of general jurisdiction where a defendant could be served.

CONCLUSION

The Commission has exercised its jurisdiction and accepted and filed the tendered rates; the Delaware courts are without jurisdiction either to collaterally review and set aside Commission actions, to enforce these rates, or to enforce some rates other than these rates, and thus are without jurisdiction under any possible theory of the case.

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of the State of Delaware should be reversed and vacated, and that thereupon the Writ of Prohibition prayed for in that court by Petitioner should issue.

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